United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

76-4268

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NIAGARA UNIVERSITY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION TO REVIEW AND CROSS-APPLICATION TO
ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF ON BEHALF OF PETITIONER NIAGARA UNIVERSITY

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REPLY BRIEF ON BEHALF OF PETITIONER NIAGARA UNIVERSITY

SUMMARY OF REPLY

We recognize that the Labor Board has a wide degree of discretion in determining an appropriate unit. However, the Labor Board's discretion is not absolute. Indeed, this Court has not hesitated to reverse unit determinations made by the Board when they are not supported by substantial evidence or are otherwise arbitrary or unreasonable, Szabo Food Services v. NLRB, __F.2d__, 94 L.R.R.M. 2264 (2d Cir. 1976); NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968).

In Szabo, this Court held that the Labor Board's unit determination could not be sustained where the Labor Board

"distorted some evidence and ignored or overlooked other contrary evidence" [p. 2266]. As we will demonstrate, the Labor Board, as in the Szabo case, has ignored and overlooked evidence diametrically opposed to its assertions and has substituted distortion, innuendo, and surmise for "substantial evidence."

We respectfully submit that the Answering Brief has resorted to distortions and unjustified suppositions for two main reasons:

First: Because the record affirmatively manifests that the Labor Board has proceeded contrary to the evidence and has acted arbitrarily, capriciously, and in violation of the Constitution and laws of the United States.

Second: Because the Labor Board is grasping at straws by its reliance upon note 3 of this Court's opinion in Nazareth Reg. High School v. NLRB, __F.2d__, 94 L.R.R.M. 2897 (2d Cir. 1977). In the Nazareth case, this Court held the "exclusion of a group of employees because of a substantial variance in pay scale" was proper [p. 2900; Emphasis supplied]. Here, however, the Regional Director's undisturbed finding is that: "Religious and lay faculty have a common wage scale and working conditions" [A. 4a; Emphasis supplied]. Despite the diametrically opposite facts in the two cases, the Labor Board seeks to place itself within the ambit of the Nazareth decision by, in effect, asserting that: As a result of possible arm twisting by their religious superiors, and the further

possibility of their being fired by the Employer University and/or being sent to the Eastern Province's version of Siberia, the Eastern Vincentian faculty are not paid the same wages because they are forced to kick-back monies to Niagara University [Ans. Br., pp. 10-13]. Such an assertion is not only offensive and unsupportable by anything in the record, but is illustrative of the lengths to which the Labor Board has gone to camouflage, by innuendo and surmise, the arbitrary and unreasonable nature of its decision herein.

We will not abet the confusion sought to be engendered in the Answering Brief by attempting to reply to all of the misstatements, inaccuracies and contradictions contained therein. Instead, we will, under the Point headings set forth in our Main Brief, deal with what we consider to be the most flagrant errors of omission and commission contained in the Answering Brief and reserve for oral argument further vivisection thereof.*

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* In addition, we reserve for brief comment upon oral argument, our reply to the Board's assertions [Ans. Br., pp. 18-19] with regard to the technical defense set forth in Point IV of our Main Brief [pp. 54-59]. We will deal herein solely with the substantive issues.

POINT I

THE EMPLOYER IS OWNED AND OPERATED BY THE EDUCATIONAL CORPORATION WHICH IS NIAGARA UNIVERSITY. THE LABOR BOARD'S FINDING THAT THE EMPLOYER UNIVERSITY IS OWNED AND OPERATED BY THE VINCENTIAN FATHERS, EASTERN PROVINCE, IS ARBITRARY AND UNREASONABLE.

We have shown in our Main Brief that the Eastern Province neither owns nor operates the Employer University [pp. 22-28].* With regard to "ownership," there is nothing in the record to negate the Regional Director's finding that: "The University holds title to all the buildings and property on the campus" [A. 3a; Emphasis supplied]. With regard to "operation," there is nothing in the record to support a finding that the Eastern Province "operates" the Employer University. All of the record evidence is to the contrary, as is the Regional Director's decision which held [A. 3a]:

> Niagara University is governed by a seventeen-member Board of Trustees, of whom not more than one-third shall be priests of the Congregation of the Mission generally referred to as the Vincentian Fathers. [Emphasis supplied].

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* It will be recalled that, as a result of its inclusion in the unit of Vincentian Father Lachowski of the New England Province and Sister Gilman, the Labor Board, in the Niagara U. C. case, 227 N.L.R.B. No. 33 (1976), restricted its claim of "ownership and operation" to the Eastern Province as distinguished from the Congregation of the Mission (Vincentian Fathers). Nevertheless, the Answering Brief, unintentionally or otherwise, muddles this distinction by its definition that "the term Vincentian is used to refer to members of the Eastern Province" [p. 10, n. 5]. Despite this, however, throughout various portions of the Answering Brief [e.g., p. 10], the Labor Board uses the term "Vincentians" as synonymous with the Congregation of the Mission as opposed to its own defined meaning of "members of the Eastern Province."

Not a scintilla of record evidence is cited in the Answering Brief to contradict either the record facts cited in our Main Brief or the findings of the Regional Director that the Eastern Province neither owns nor operates the Employer University. And, there being no "ownership or operation" by the Eastern Province, there cannot be (and, indeed, the Answering Brief does not assert that there is) any "conflicting loyalties" by the Eastern Vincentian faculty.

Accordingly, there is no evidence, much less the required substantial evidence, to support the Labor Board's assertions of ownership and operation or its concomitant assertion of "conflicting loyalties."

The Labor Board's decision must, therefore, be overturned by this Court, Szabo Food Services v. NLRB, __F.2d__, 94 L.R.R.M. 2264 (2d Cir. 1976); NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968).

POINT II

THE LABOR BOARD'S RELIANCE UPON THE VOWS OF OBEDIENCE AND POVERTY, WHICH RELATE TO RELIGIOUS MATTERS, IS IN VIOLATION OF THE CONSTITUTION AND THE CIVIL RIGHTS ACT AND THEREFORE IS ARBITRARY AND UNREASONABLE. IN ADDITION, THE EXCLUSION OF THE EASTERN VINCENTIAN FACULTY WHO TAKE THE SAME VOWS AS "RELIGIOUS FACULTY" WHO ARE INCLUDED WITHIN THE UNIT IS ARBITRARY AND UNREASONABLE.

The flagrant violation by the Labor Board of the Constitutional and civil rights of the Eastern Vincentian faculty is manifested by its assertion that:

> the Board's exclusion of religious faculty from bargaining units under the Act are efforts to accomodate [sic] the national employment law to the unique relationship existing in the context of religious education. Simply recognizing that such relationships exist, and according special status to them under the law so that they will not be compromised, is entirely consistent with both principles of religious freedom and religious nondiscrimination. [Ans. Br., p. 14, n. 7; Emphasis supplied]. *

The Labor Board further asserts that the "accommodation" it seeks to impose upon the Eastern Vincentian faculty is to permit them to "form a separate unit" [Ans. Br., p. 17].

The Labor Board simply does not recognize that the days of "accommodating" and foisting a "special status" upon individuals by segregating them because of their race or religious practices and beliefs ended almost a quarter of a century ago.

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* Contradictorily, the Labor Board asserts that "what the University seeks is not equal treatment but special treatment for the Vincentians." [Ans. Br., p. 16]. We fail to understand how the request to belong to the same unit as all other faculty members is a request for special treatment.

Brown v. Board of Education, 347 U.S. 483 (1954). Separate is not equal, either as a matter of law or as a matter of fact.

The 12 (or, at most 17*) Eastern Vincentian faculty comprise only about 10% of the more than 140 full-time faculty at the Employer University [A. 3a]. A Niagara University Religious Vincentian Teachers Union would represent 10% of the full-time faculty and a Niagara University Lay Teachers Union would represent the other 90% of the faculty. Either, or both, unions could seek to exclude the other from performing bargaining unit work (viz: teaching) or could seek to obtain superseniority in layoffs for the members of the unit it represents. Is it not probable that the bargaining power of the 90% would prevail?

Nor are these results fanciful ones. Indeed, the Labor Board has furthered the likelihood of such results by its holding that a union representing lay faculty could properly seek, in negotiations, to exclude religious faculty members from teaching. Seton Hill College, 201 N.L.R.B. 1026, 1027, n. 3 (1973). This is unlawful as well as unconstitutional. See Brown v. Board of Education, supra, and other authorities discussed in our Main Brief at pages 28-36 and 50-53.

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* The Union sought to exclude five Eastern Vincentians as part-time faculty. The Answering Brief asserts that "the record supports this contention." [p. 3, n. 3]. The Regional Director, however, did not determine whether these employees were full or part-time faculty because "their status as religious faculty excludes them from the unit." [A. 5a]. We have not and will not deal with the question of whether these 5 faculty members are full or part-time. We deal only with those 12 who have been determined to be full-time faculty.

Moreover, the sole basis for the Labor Board's granting "special status" to the Eastern Vincentian faculty relates to the disposition of their salaries under their vow of poverty. We underscore the word "disposition" because it is beyond dispute that their wages are precisely the same as that of the lay faculty. Thus, the Regional Director specifically found that: "Religious and lay faculty have a common wage scale" [A. 4a]. Indeed, the Labor Board states that the Eastern Vincentian faculty "nominally receive the same wages as other faculty" [Ans. Br., pp. 10, 12].

We are not aware of any cases, other than those involving "religious," where the Labor Board has deemed it appropriate, in a unit determination, to take into consideration the disposition of an individual's salary. Indeed, the Labor Board in the Niagara U. C. case specifically rejected, in nonreligious areas, the relevancy of an individual's disposition of his wages. It stated [A. 44a-45a]:

> In short, we do not believe that the way a person chooses to spend his or her money is a relevant consideration with respect to questions of unit placement.

To the same effect, see Lemon v. Sloan, 340 F.Supp. 1356 (E.D. Pa. 1972), aff'd. 413 U.S. 825 (1973), reh.denied, 414 U.S. 881; Hysong v. Gallitzin Borough School District, 164 Pa. 629, 30 A. 482 (1894), discussed in our Main Brief at pages 43 to 44.

The Labor Board does not and cannot dispute the fact that the religious vow of poverty, which is made solely to God [Tr. 117], is the reason that the Eastern Vincentian faculty

member assigns his wages to the Eastern Province. We respectfully submit that the exercise of the religious vow of poverty may not be considered by the Labor Board nor used by it to accord "special status" or to "accommodate" Eastern Vincentian faculty by segregation. For, if it were otherwise, the Eastern Vincentian faculty member would be forced to choose between adhering to his vow of poverty (and be segregated into a unit of 10% of the faculty) or abandoning his religious vow (and be treated like everyone else).

Mr. Justice Stewart put it plainly: "no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment...." Sherbert v. Verner, 374 U.S. 398, 413 (1963) (concurring opinion).

Where governmental action directly or indirectly interferes with or burdens an individual's exercise of his religion or religious beliefs, such action may be justified only by a compelling governmental interest. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, supra. Even an "incidental burden" on the free exercise of religion must be justified by a compelling state interest. Sherbert v. Verner, supra, 374 U.S. at 403.

Yoder and Sherbert involved statutes of general applicability, neutral on their face, involving such matters as compulsory education and unemployment insurance. Nevertheless, because those statutes interfered with religious practices and

beliefs, the Court made exceptions or exemptions in order to permit the free exercise of religion. The instant case is much stronger since the challenged certification, on its face, discriminates against the Eastern Vincentian faculty. No special exception or exemption is sought here; the faculty members who belong to the Eastern Province simply ask to be treated in the same manner as other faculty. Thus, interests even greater than those asserted in Sherbert and Yoder are necessary to justify the challenged action. *

As noted above, we agree with the general principle that the Labor Board has wide discretion in determining the appropriate collective bargaining unit. But where that determination infringes upon the right of employees to the free exercise of their religious beliefs, the Board must satisfy a

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* Accordingly, the authorities cited by the Labor Board, in its attempt to make the Constitution subservient to the National Labor Relations Act, are distinguishable. Thus, for example, the Eastern Vincentian faculty members are not seeking to rely upon their religious practices and beliefs to avoid the monetary obligations of union membership. Accordingly, the cases cited by the Labor Board [viz., Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956); Yott v. North American Rockwell Corp., 501 F.2d 398 (9th Cir. 1974); Linscott v. Millers Fall Co., 440 F.2d 14 (1st Cir. 1971), cert. denied, 404 U.S. 872 (1971)] are not applicable. In this connection it should be noted, however, that Congress has recently recognized in the health care area that employees who, because of religious beliefs, cannot conscientiously pay dues to a union, can accommodate their religious beliefs by making donations to charities. 29 U.S.C.§169(Supp. IV, 1974). Nor are the Eastern Vincentian faculty seeking to avoid the duty of bargaining in good faith as did the employer in Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883 (D.C. Cir. 1970). On the contrary, the Employer University asserts that the Eastern Vincentian faculty are entitled to the benefits of collective bargaining and to have the Lay Teachers Union, which represents 90% of the faculty, represent them as well.

much greater burden. No matter how the test is stated, the Supreme Court noted:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. [Wisconsin v. Yoder, supra, 406 U.S. at 215; Emphasis supplied].

The record in this case is totally devoid of evidence that the government has an interest of the "highest order" in excluding Eastern Vincentian faculty from the unit. On the contrary, the Labor Board in D'Youville College, 225 N.L.R.B. No. 104, 92 L.R.R.M. 1578 (1976) has held that "no statutory or other overriding policy consideration exists precluding" the inclusion of religious faculty members in a unit with lay faculty. And, in the D'Youville case, the religious faculty who were included in an over-all faculty unit have the same employment relationship to D'Youville College that the Eastern Vincentian faculty have to Niagara University. [See the discussion of the D'Youville case in our Main Brief, at pages 29 to 30 and 41 to 42].

POINT III

EASTERN VINCENTIAN FACULTY SHARE A COMMUNITY OF INTEREST WITH THOSE INCLUDED IN THE UNIT CERTIFIED BY THE BOARD; THEREFORE THE BOARD'S REFUSAL TO INCLUDE THEM IS ARBITRARY AND UNREASONABLE.

The Labor Board seeks to use this Court's opinion in the Nazareth case, supra, to justify its lack of substantial (or, indeed, any) evidence to support its claim of "ownership and operation" as well as to support its unconstitutional and unlawful reliance upon religious vows made to God. It asserts that by footnote 3 of that opinion, this Court "must have implicitly rejected" all of the Constitutional and civil rights arguments asserted by the Employer University [Ans. Br., p. 16]. It further asserts that the Nazareth case is "indistinguishable" and is "direct precedent for the Board's action here and supports enforcement of its order" [Id., p. 13].

Footnote 3 of this Court's opinion in Nazareth states [94 L.R.R.M. at 2900]:

> Nazareth contends that the unit is inappropriate because it improperly excludes the religious faculty. Although subject to the same conditions of employment and holding positions of equal responsibility, the members of the religious faculty are paid substantially less than the lay faculty. The NLRB has wide discretion in determining the appropriate bargaining unit, Wheeler-Van Lable Co. v. NLRB, 408 F.2d 613, 616-17, 70 LRRM 3055 (2d Cir.), cert. denied, 396 U.S. 834, 72 LRRM 2432 (1969), and the exclusion of a group of employees because of substantial variance in pay scale was a proper exercise of discretion. The unit of non-supervisory, full-time, lay faculty is appropriate. [Emphasis supplied].

Thus, this Court's opinion turned solely upon the fact that "the exclusion of a group of employees because of a substantial

variance in pay scale" was proper [Emphasis supplied]. Here, however, the Regional Director's undisturbed finding is that: "Religious and lay faculty have a common wage scale and working conditions" [A. 4a; Emphasis supplied]. Thus, the findings of this Court in Nazareth and the findings of the Regional Director regarding the Employer University, involve diametrically opposite facts.*

Nevertheless, the Answering Brief asserts that only "nominally" do the Eastern Vincentian faculty "receive the same wages as other faculty" [pp. 10, 12]. By use of the adverb "nominally" the Labor Board, in a desperate attempt to gain some mileage from Nazareth, seeks to have this Court take not one, but two steps beyond the Nazareth case. As we will now show, even if this Court were to take these two giant steps, they are steps leading to nowhere.

The first giant step that the Labor Board seeks to have this Court take is to look into the Eastern Vincentian faculty member's disposition of his salary. Not only are there Constitutional roadblocks to making any such inquiry into disposition of his earnings pursuant to religious vows [See Point II herein and in our Main Brief], but the Labor Board, itself, has held such an inquiry regarding disposition of wages to be irrelevant.

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* The cases cited by the Labor Board [viz., the University of Miami, 213 N.L.R.B. 634 (1974); Capitol City, Inc., 212 N.L.R.B. 418 (1974)] likewise involved differences in pay scale and not an inquiry into the disposition of wages.

Thus, in the Niagara U. C. case, the Labor Board stated that "we do not believe that the way a person chooses to spend his or her money is a relevant consideration with respect to questions of unit placement" [A. 44a-45a; footnotes omitted]. The Labor Board went on to say in one of the footnotes to the foregoing statement that:

> The alleged pertinence of questions on how money is spent seems in part to rest on an unstated and unproven assumption that a desire for income is somehow related to the particular manner in which it is spent; i.e., on how much it is needed. The whole concept here is at best a morass with which this Board has no special expertise to deal. Furthermore, it is beside the point. To take an example, an independently wealthy lay professor would not be excluded from a unit simply because he or she did not 'need' the income or had no interest in a pay raise. [A. 45a; Emphasis supplied].

Moreover, even if this Court were to take this first giant step, all it would find is that the Eastern Vincentian faculty do nothing more than Vincentian Father Lachowski and the three nuns who were included within the unit in the Niagara U. C. case or the nuns who were included within the unit in D'Youville, viz, they have their salaries turned over to their respective orders.*

The second step the Labor Board would have this Court take is an inquiry into the disposition of funds, not of the

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* As stated in Lemon v. Sloan, 340 F.Supp. 1356, 1363 n. 7, (E.D.Pa. 1972), aff'd. 413 U.S. 825 (1973), reh.denied, 414 U.S. 881:

> [T]here is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members.

individual, but by the religious order. We fail to perceive how any question of unit determination can turn on whether a religious order contributes to one charity rather than another.* Moreover, even if this Court were to take this second giant step, all it would find is that the Eastern Province paid for the living expenses of the Eastern Vincentian faculty [RC Tr. 109, 115], retained some of the money, and donated a gift to Niagara University [RC Tr. 134]. Yet, this is no different from the D'Youville College case, where the Labor Board included in the unit religious faculty whose order deducted their living expenses "with the remainder being returned by way of a gift to their employer" [92 L.R.R.M. at 1579].

Thus, even if this Court were to take the two giant steps the Labor Board seeks, the Nazareth case is of no avail to it. We end where we started: on the one hand, the decision by this Court in Nazareth which is based upon "a substantial variance in pay scale"; and, on the other hand, an opposite and undisturbed finding herein by the Regional Director that "Religious and lay faculty have a common wage scale and working conditions." [Emphasis supplied throughout].

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* The Labor Board does not assert that the contributions by the Eastern Province were anything other than a gift. It does assert, however, that: "it is difficult to believe that the excess of salary above living expenses is not automatically returned to the University or would ever be contributed to any other institution" [Ans. Br., p. 12]. It is manifest that the Labor Board is again seeking to substitute unsupportable conjecture for "substantial evidence." The charity to which the Eastern Province will grant its largesse is known only to, and will be determined solely by, that Province.

Thus, the Labor Board, as in Szabo Food Services v. NLRB, __F.2d__, 94 L.R.R.M. 2264 (2d Cir. 1976), has "distorted some evidence and ignored or overlooked other contrary evidence" [p. 2266]. Similarly, it has "distorted" and "ignored" its contrary holdings in the D'Youville case and in the Niagara U. C. case. The Labor Board's assertion of a case-by-case approach [Ans. Br., pp. 7, 9] has culminated in case-by-case confusion. Indeed, the actions of the Labor Board herein are perhaps the most vivid demonstration of the folly (and unconstitutionality) of the Labor Board's trespassing into religious matters. Its decision is arbitrary, unreasonable, and unsupported by substantial evidence and, therefore, must be overturned by this Court. Szabo Food Services v. NLRB, supra; Kenston Trucking Co. v. NLRB, 544 F.2d 1165 (2d Cir. 1976); NLRB v. Solis Theatre Corp., 403 F.2d 381 (2d Cir. 1968).

CONCLUSION

For the reasons set forth herein and in our Main Brief, the Employer University respectfully requests that this Court direct the Labor Board to delete its exclusion of full-time Eastern Vincentian faculty from the unit and enter a judgment (a) granting the Employer University's Petition to Review and Set Aside the Labor Board's Order and (b) denying the Cross Petition of the Labor Board for Enforcement of its Order.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Reply Brief on Behalf of Petitioner Niagara University has this day been served by first-class mail upon the following Counsel for Respondent at the address listed below:

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